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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ISRAEL GARCIA,

Plaintiff,

v.

NUNO, et al.,

Defendants.

Civil No. 3:14-CV-00243 BAS (BGS)

**REPORT AND
RECOMMENDATION: GRANTING
IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

[Doc. No. 33]

This Report and Recommendation is submitted to United States District Judge Cynthia Bashant pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.3.

I. INTRODUCTION

Plaintiff Israel Garcia ("Plaintiff"), is a litigant proceeding *pro se* and *in forma pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983. [First Amended Complaint at 1, ECF No. 16 ("FAC").]¹ Plaintiff makes the following claims in his FAC: (1) Eighth Amendment deliberate indifference and Fourteenth Amendment due process violations against Officer Elmore [*Id.* at 2, 5-6]; (2) Eighth Amendment excessive force, Fourteenth Amendment due process, and First Amendment retaliation violations against

¹Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court's electronic case filing system.

1 Officer Nuno [*Id.* at 2, 7-14]; (3) Fourteenth Amendment due process, Eighth Amendment
 2 deliberate indifference and First Amendment retaliation violations against registered nurses
 3 Manuel and Silva [*Id.* at 4, 7-17]; (4) Fourteenth Amendment due process violation against
 4 Lt. Beltran [*Id.* at 3, 13]; (5) Eighth Amendment deliberate indifference and First
 5 Amendment retaliation violations against Dr. Kornbluth [*Id.* at 3, 15]; (6) Eighth
 6 Amendment deliberate indifference violations against Dr. Ball; (7) Eighth Amendment
 7 deliberate indifference violations against Warden Montgomery [*Id.* at 2, 5-6, 8]; and (8)
 8 Fourteenth Amendment retaliation violations generally against correctional staff and
 9 medical staff. [*Id.* at 12.] Plaintiff further requests injunctive relief concerning medical unit
 10 operations. [*Id.* at 17.]

11 Defendants filed the instant Motion to Dismiss pursuant to Federal Rule of Civil
 12 Procedure 12(b)(6) on January 23, 2015. [Mot. to Dismiss at 1, ECF No. 31 (“Mot.”).]
 13 Plaintiff did not file an opposition or any other response to Defendants’ Motion.² Defendants
 14 contend that Plaintiff’s claims should be dismissed for several reasons. First, Defendants
 15 argue that Plaintiff’s excessive force claim against Officer Nuno should be dismissed under
 16 the favorable termination doctrine. [*Id.* at 16.] Next, Defendants assert that Plaintiff’s
 17 claims fail to satisfy the deliberate indifference standard because he does not allege specific
 18 injuries, he cannot bring a claim on behalf of another inmate, and he does not establish that
 19 any Defendant displayed deliberate indifference to his medical needs. [*Id.* at 16-26.]

20 Moreover, Defendants urge that Plaintiff’s due process claims should be dismissed
 21 under the favorable termination doctrine, as well as for failure to allege a violation in
 22 specific proceedings, and because he received all the process he was due. [*Id.* at 16-26.]
 23 Finally, Defendants argue for dismissal of all of Plaintiff’s First Amendment retaliation
 24 claims for failing to link the retaliation to a protected activity and because Plaintiff’s claims
 25 are otherwise unsubstantiated. [*Id.*]

27 ²Under Civil Local Rule 7.1.f.3.c if an opposing party fails to file the papers in the manner
 28 required by Civil Local Rule 7.1.e.2, that failure may constitute a consent to the granting of a
 motion or other request for ruling by the court. The Court will, however, address the motion on
 its merits.

1 For the reasons set forth below, this Court **RECOMMENDS** that Defendants' Motion
 2 to Dismiss be **GRANTED** on all claims except the Eighth Amendment excessive force
 3 claim against Officer Nuno and the Eighth Amendment deliberate indifference claim against
 4 Dr. Kornbluth.

5 **II. STANDARD OF REVIEW**

6 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for motions to dismiss
 7 for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In
 8 considering a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true the
 9 allegations of the complaint in question, *Erickson v. Pardus*, 551 U.S. 89 (2007), and
 10 construe the pleading in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395
 11 U.S. 411, 421 (1969); *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999). A
 12 claim upon which the court can grant relief must have facial plausibility. *Bell Atlantic v.*
 13 *Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff
 14 pleads factual content that allows the court to draw the reasonable inference that the
 15 defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
 16 Attachments to a complaint are considered to be part of the complaint for purposes of a
 17 motion to dismiss for failure to state a claim. *Hal Roach Studios, Inc. v. Richard Feiner &*
 18 *Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990).

19 A motion to dismiss for failure to state a claim should not be granted unless it appears
 20 beyond doubt that the plaintiff can prove no set of facts in support of his claims which
 21 would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). In general,
 22 pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines*
 23 *v. Kerner*, 404 U.S. 519, 520 (1972). The court has an obligation to construe such pleadings
 24 liberally. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en banc). The court's
 25 liberal interpretation of a pro se complaint however, may not supply essential elements of
 26 the claim that were not pled. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268
 27 (9th Cir. 1982).

28 ///

III. DISCUSSION

The facts are taken from Plaintiff's FAC and are viewed in the light most favorable to Plaintiff. Plaintiff attached nearly a hundred pages of documents to his complaint and when documents are attached to a complaint, the Court is not limited to the allegations contained in the complaint; rather the attached documents become part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts to support the claim. *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991); *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

A. Eighth Amendment Excessive Force Claim Against Officer Nuno

According to Plaintiff, on February 23, 2013, Officer Nuno confiscated hygiene items Plaintiff tried to slip under an inmate's door. [FAC at 9.] A discussion ensued over whether Nuno should return the hygiene items to Plaintiff. [*Id.*] Plaintiff could see that Officer Nuno was very mad, and accordingly, he stepped away from the officer, took off his glasses and put them in his front shirt pocket. [*Id.*] When Plaintiff looked back up, Officer Nuno's elbow hit him on the left side of his face, making him fall. [*Id.* at 10.] Plaintiff alleges he was on the floor with Officer Nuno on top of him and continuing to attack. [*Id.*] Once other officers approached, Officer Nuno stopped his attack, and handcuffed Plaintiff without incident. [*Id.*] Plaintiff received a medical evaluation on the day of the incident, and the report documents complaints of pain to the right side of his chest. [FAC at 10.] Later that day a doctor was called. [*Id.* at 11, 14.] The doctor prescribed codeine #3 for pain, and a EKG was performed. [*Id.*] Plaintiff received no further testing, although it was discovered about two months later after an X-ray and bone scan that he had fractured ribs in the healing process.³ [*Id.*]

1. Legal Standard

When prison officials are accused of using excessive force on an inmate in violation of the Eighth Amendment, the relevant inquiry is whether the force was applied in a good

³The record does not establish whether Plaintiff broke his ribs as a result of the incident with Officer Nuno or at another time before or after the incident.

1 faith effort to maintain or restore discipline, or maliciously and sadistically for the very
 2 purpose of causing harm. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Hudson v.*
 3 *McMillian*, 503 U.S. 1, 6-7 (1992). To succeed on an excessive force claim, plaintiff must
 4 establish that defendant unnecessarily and wantonly inflicted pain. *See Whitley*, 475 U.S.
 5 at 320; *see also Jeffers v. Gomez*, 267 F.3d 895, 900 (9th Cir. 2001). Under *Whitley*, the
 6 relevant factors in determining whether a use of force violated the Eighth Amendment are:
 7 (1) the need for use of force; (2) the relationship between the need for force and the amount
 8 used; (3) the extent of injury inflicted; (4) the extent of the threat the officers reasonably
 9 perceived the plaintiff posed to staff and inmate safety; and (5) any efforts made to temper
 10 the severity of the forceful response. *Id.* at 21; *see also Hudson*, 503 U.S. at 7. “[T]he
 11 absence of an emergency may be probative of whether the force was indeed inflicted
 12 maliciously or sadistically.” *Jordan v. Gardner*, 986 F.2d 1521, 1528 n. 7 (1993). The
 13 Supreme Court has reiterated that the Eighth Amendment may be violated by the use of
 14 excessive force against a prison inmate “[even] when the inmate does not suffer serious
 15 injury.” *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1176 (2010) (quoting *Hudson*, 503 U.S. at 4.)
 16 While the extent of an inmate’s injury is relevant to the Eighth Amendment inquiry,
 17 “[i]njury and force...are only imperfectly correlated, and it is the latter that ultimately
 18 counts,” *Wilkins*, 130 S. Ct. at 1178. At the same time:

19 [N]ot “every malevolent touch by a prison guard gives rise to a federal cause
 20 of action.” *Hudson*, 503 U.S. at 9. “The Eighth Amendment’s prohibition of
 21 ‘cruel and unusual’ punishments necessarily excludes from constitutional
 22 recognition de minimis uses of physical force, provided that the use of force
 23 is not of a sort repugnant to the conscience of mankind.”

24 *Id.*

25 2. Application to Plaintiff’s Claim Against Officer Nuno

26 At the outset, Defendants contend that a judgment in Plaintiff’s favor on his excessive
 27 use of force claim would necessarily imply the invalidity of Plaintiff’s prison disciplinary
 28 conviction stemming from the incident with Officer Nuno. Such a judgment would be in
 violation of the rule announced in *Heck v. Humphrey*, 513 U.S. 477 (1994).

In *Heck*, the Supreme Court held:

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would

render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on the direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Heck, 513 U.S. at 486-87 (footnotes omitted) (emphasis omitted). The holding in *Heck* applies in the context of prison disciplinary convictions where the loss of good time credits is assessed. *See Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (claims for declaratory relief and money damages challenging prison disciplinary hearing procedures were *Heck*-barred because the nature of the allegations, if proven, would necessarily imply the invalidity of the result of the prison disciplinary hearing); *see also Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (“*Heck*, in other words, says that if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed.”).

It is not the case, however, that if a prisoner resists a correctional officer, the officer may use whatever amount of force he or she wishes to subdue the individual. *See Whitley*, 475 U.S. at 321. Accordingly, an Eighth Amendment excessive force claim by a prisoner against a correctional officer is not necessarily fundamentally inconsistent with the validity of a prison disciplinary conviction for resisting staff that arises from the same incident. *See e.g., Hooper v. County of San Diego*, 639 F.3d 1127, 1133 (9th Cir. 2011) (excessive force claim not *Heck*-barred because “[a] holding in *Hooper*’s § 1983 case that the use of the dog was excessive force would not ‘negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of Hooper’s attempt to resist it when she jerked her hand away from Deputy Terrell’”) (internal brackets omitted); *Smith v. City of Hemet*, 394 F.3d 689, 696 (9th Cir. 2005) (“Under *Heck*, Smith would be allowed to bring a § 1983 action, however, if the use of excessive force occurred subsequent to the conduct on which his conviction was

1 based.”); *Smithart*, 79 F.3d at 952-53 (reversing the district court’s dismissal of an excessive
2 force action brought by an arrestee under the Fourth Amendment, because a successful
3 result for the plaintiff would not necessarily imply the invalidity of the plaintiff’s arrest or
4 conviction for assault with a deadly weapon where the plaintiff maintained that the
5 defendant arresting officers, used force far greater than required for his arrest and out of
6 proportion to the threat which he posed); *see also Huey v. Stine*, 230 F.3d 226, 230 (6th Cir.
7 2000) (“In general, the federal courts hold that Eighth Amendment claims do not run afoul
8 of *Heck* because the question of the degree of force used by a ... correctional officer is
9 analytically distinct from the question whether the plaintiff violated the law.”), abrogated
10 on other grounds by *Muhammad v. Close*, 540 U.S. 749 (2000); *Shelton v. Chorley*, No.
11 1:07-CV-560-MHM, 2011 U.S. Dist. Lexis 35053 (E.D. Cal. Mar. 31, 2011) (finding that
12 the prisoner plaintiff’s excessive use of force claim against a correctional officer was not
13 *Heck*-barred despite plaintiff’s prison disciplinary conviction for battery on a peace officer
14 because “it is possible that plaintiff attempted to batter defendant *and* that defendant used
15 excessive force in subduing plaintiff.”).

16 In this case, the factual context in which the force was used is disputed. For purposes
17 of the *Heck* analysis, it is possible that Plaintiff could prevail on his excessive force claim
18 without necessarily implying the invalidity of his prison disciplinary conviction. For
19 instance, he could prove: (1) Officer Nuno responded to Plaintiff’s resistance with an
20 unjustified and excessive amount of force; or (2) Officer Nuno used excessive force before
21 or after, instead of in response to Plaintiff’s resistance. In other words, while Plaintiff’s
22 version of the events contradicts the disciplinary hearing officer’s finding that Plaintiff was
23 guilty of resisting staff, which resulted in the use of force; Plaintiff’s success on his
24 excessive force claim does not *necessarily* invalidate the prison disciplinary finding that
25 Plaintiff resisted staff. Accordingly, the Court concludes that Plaintiff’s excessive force
26 claim is not *Heck*-barred.

27 Because Plaintiff’s claim is not *Heck*-barred, Plaintiff may proceed on his excessive
28 force claim so long as he alleges facts to show that Officer Nuno unnecessarily and

wantonly inflicted pain on him. [FAC at 9]; *see Whitley*, 475 U.S. at 320. Again, the relevant factors include: (1) the need for force; (2) the relationship between the need for force and the amount of force used; (3) the extent of the injury inflicted; (4) the extent of the threat the officers reasonably perceived Plaintiff posed to staff and inmates; and (5) any efforts to temper the severity of a forceful response. *Id.* at 321.

Plaintiff alleges that Officer Nuno and him had a dispute about whether the hygiene items Plaintiff attempted to give to another inmate should be returned to him. [FAC at 9.] Plaintiff claims Officer Nuno became upset, and while Plaintiff removed his glasses Officer Nuno used his elbow to hit Plaintiff on the left side of his face. Plaintiff fell to the ground and Officer Nuno continued to attack him. [*Id.*] In contrast, the prison disciplinary proceedings indicate that Officer Nuno claims Plaintiff hit him in the chest after Plaintiff removed his glasses, which required Officer Nuno to take Plaintiff to the ground. [*Id.* at 7; Incident Report at 10, attached as an exhibit to FAC at 12 ECF 16-1.] The RVR indicates that Plaintiff was found guilty of assaulting Officer Nuno and was assessed 150 days forfeiture of credits. [RVR attached to exhibits to FAC at 16; ECF 16-1.] Based on the discrepancy between Plaintiff's allegations and the documents, a factual dispute exists with respect to whether Officer Nuno's need for force and the amount of force used was reasonable in the circumstances.

Construing the pleadings in the light most favorable to Plaintiff, Plaintiff could prove facts in support of his claims which would entitle him to relief. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Accordingly, the Court recommends that Defendant Nuno's Motion to Dismiss Plaintiff's excessive force claim be denied.

B. Eighth Amendment Deliberate Indifference Claims

Plaintiff alleges an Eighth Amendment deliberate indifference claim against Officer Elmore for her failure to protect another inmate. (FAC at 5.) He also alleges an Eighth Amendment deliberate indifference claim against Defendants Manuel and Silva for their role in his medical treatment, and an Eighth Amendment deliberate indifference claim against

1 Dr. Kornbluth for his role in delaying Plaintiff's receipt of medical treatments and testis
2 removal surgery. (FAC at 14-15.)

3 The Fourth Circuit Court of Appeals has noted that "the standard of liability is the
4 same" for assessing overlapping failure to protect claims, and deliberate indifference to
5 serious medical needs claims, "and therefore independent analysis of each count is
6 unnecessary." *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 302 (4th Cir. 2004) citing
7 *Young v. City of Mount Rainer*, 238 F.3d 567, 575 (4th Cir. 2001). As explained in *Young*:

8 [A failure to protect] claim is no different in any meaningful respect from the
9 indifferent-to medical-needs claim and is governed by the same standard of
10 deliberate indifference. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991)
11 (finding "no significant distinction between claims alleging inadequate medical
12 care and those alleging inadequate 'conditions of confinement' and concluding
13 that an inmate's failure-to-protect claim must be measured under the deliberate
14 indifference standard); *Hare v. City of Corinth*, 74 F.3d 633, 644 (5th Cir.
15 1996) (en banc) (noting "the absence of a constitutionally significant
16 distinction between failure to protect claims and medical care claims"). We
17 therefore conclude that [plaintiffs'] claims must be measured under a standard
18 of deliberate indifference.
19 238 F.3d at 575.

20 "The Fourth Circuit's reliance on a common deliberate indifference analysis to assess
21 factually similar claims alleging both a failure to protect and deliberate indifference to
22 serious medical needs, is consistent with Ninth Circuit legal standards." *Manago v. William*,
23 2013 U.S. Dist. LEXIS 183734 (E.D. Cal. Mar. 13, 2013).

24 1. Legal Standard: Failure to Protect Claim

25 "A prison official may be held liable under the Eighth Amendment for denying
26 humane conditions of confinement only if he knows that inmates face a substantial risk of
27 serious harm and disregards that risk by failing to take reasonable measures to abate it."
28 *Farmer v. Brennan*, 511 U.S. at 825, 847 (1994). The duty to protect a prisoner from
serious harm requires that prison officials take reasonable measures to guarantee the safety
and well being of the prisoner. *Id.* at 832-33; *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir.
1998). To sustain a failure to protect claim on motion to dismiss, the inmate must
demonstrate: (1) a deprivation that was objectively sufficiently serious resulting in the
denial of "the minimal civilized measure of life's necessities," and (2) defendant knew of,
and disregarded, an excessive risk to prisoner's safety. *Farmer*, 511 U.S. at 834, 837. It

1 is not enough to show a defendant should have known of the risk; actual notice on the part
 2 of the prison official is required to show deliberate indifference. *Id.* at 837-38 and 843 n.8.
 3 The official must both be aware of facts from which the inference could be drawn that a
 4 substantial risk of serious harm exists, and the official must also draw the inference. *Id.*
 5 Before being required to take action, the official must have more than a “mere suspicion”
 6 that an attack upon an inmate will occur. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.
 7 1986). “Deliberate indifference is a high legal standard.” *Torguchi v. Chung*, 391 F.3d
 8 1051, 1060 (9th Cir. 2004). “This is not an easy test to satisfy.” *Hallet v. Morgan*, 296 F.3d
 9 732, 744-45 (9th Cir. 2002).

10 2. *Application to Claim Against Officer Elmore*

11 On January 23, 2013, Plaintiff was admitted to the infirmary (also known as the
 12 Correctional Treatment Center or “CTC”) for observation due to lower back pain. [FAC at
 13 5; Exhibit A-1.] On February 18, 2013, Correctional Officer Elmore let Plaintiff, who is a
 14 general population (“GP”) inmate, out for a shower with a Special Needs Yard (“SNY”)
 15 inmate, and a fight ensued. [*Id.* at 5.] When Officer Elmore told the inmates to stop, they
 16 complied. [*Id.*] Elmore knew it was against protocol to let a SNY inmate and a GP inmate
 17 out at the same time because the SNY inmate must be protected at all times. [*Id.*] She told
 18 Plaintiff and the other inmate that they were to say nothing happened since she was the only
 19 person who had seen them fighting. [*Id.*] Officer Elmore allegedly tried to cover-up the
 20 incident by falsely preparing reports to avoid repercussions for failing to properly follow
 21 protocol. [*Id.*] Plaintiff claims Officer Elmore failed to provide protection for the SNY
 22 inmate and acted recklessly, amounting to Eighth Amendment deliberate indifference. [*Id.*]

23 Plaintiff’s failure-to-protect claim against Officer Elmore fails to assert an Eighth
 24 Amendment violation. First, Plaintiff does not state a substantial deprivation as to his
 25 person, but rather asserts a claim on behalf of another inmate. Second, he does not state any
 26 facts sufficient to demonstrate that Officer Elmore had actual knowledge that a fight
 27 between the two inmates would ensue as a result of her actions. Finally, Plaintiff alleges no
 28 injuries. For these reasons, the undersigned recommends that Defendant Elmore’s Motion

1 to Dismiss Plaintiff's deliberate indifference claim be granted. The Court further
 2 recommends that Plaintiff not be permitted leave to amend this claim because amendment
 3 would be futile given the fact Plaintiff's allegations are not based on any harm he suffered,
 4 but rather on behalf of another inmate.

5 3. Legal Standard: Medical Care Claims

6 Where a prisoner's Eighth Amendment claims arise in the medical care context, the
 7 prisoner must allege and prove "acts or omissions sufficiently harmful to evidence deliberate
 8 indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). An
 9 Eighth Amendment medical care claim has two elements: "the seriousness of the prisoner's
 10 medical need and the nature of the defendant's response to that need." *McGuckin v. Smith*,
 11 974 F.2d 1050, 1059 (9th Cir. 1991), overruled on other grounds by *WMX Techs., Inc. v.*
 12 *Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). A medical need is serious "if the failure
 13 to treat the prisoner's condition could result in further significant injury or the 'unnecessary
 14 and wanton infliction of pain.'" *McGuckin*, 974 F.2d at 1059 (quoting *Estelle*, 429 U.S. at
 15 104). Indications of a serious medical need include "the presence of a medical condition
 16 that significantly affects an individual's daily activities." *Id.* at 1059-60. By establishing
 17 the existence of a serious medical need, a prisoner satisfies the objective requirement for
 18 proving an Eighth Amendment violation. *Farmer*, 511 U.S. at 834.

19 If a prisoner establishes the existence of a serious medical need, he must then show
 20 prison officials responded to the serious medical need with deliberate indifference. *Farmer*,
 21 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials
 22 deny, delay, or intentionally interfere with medical treatment, or may be shown by the way
 23 in which prison officials provide medical care. *Hutchinson v. United States*, 838 F.2d 390,
 24 393-94 (9th Cir. 1988). Before it can be said that a prisoner's civil rights have been
 25 abridged with regard to medical care, however, "the indifference to his medical needs must
 26 be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support
 27 this cause of action." *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980)
 28 (citing *Estelle*, 429 U.S. at 105-06). See also *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th

1 Cir. 2004) (“Mere negligence in diagnosing or treating a medical condition, without more,
 2 does not violate a prisoner’s Eighth Amendment rights.”); *McGuckin*, 974 F.2d at 1059
 3 (same). Deliberate indifference is “a state of mind more blameworthy than negligence” and
 4 “requires ‘more than ordinary lack of due care for the prisoner’s interests or safety.’”
 5 *Farmer*, 511 U.S. at 835 (quoting *Whitley*, 475 U.S. at 319).

6 Delays in providing medical care may manifest deliberate indifference. *Estelle*, 429
 7 U.S. at 104-05. To establish a claim of deliberate indifference arising from delay in
 8 providing care, a plaintiff must show that the delay was harmful. *See Berry v. Bunnell*, 39
 9 F.3d 1056, 1057 (9th Cir. 1994); *McGuckin*, 974 F.2d at 1059; *Wood v. Housewright*, 900
 10 F.2d 1332, 1335 (9th Cir. 1990); *Hunt v. Dental Dep’t*, 865 F.2d 198, 200 (9th Cir. 1989).
 11 In this regard, “[a] prisoner need not show his harm was substantial; however, such would
 12 provide additional support for the inmate’s claim that the defendant was deliberately
 13 indifferent to his needs.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). *See also*
 14 *McGuckin*, 974 F.2d at 1060. “Thus, a complaint that a physician has been negligent in
 15 diagnosing or treating a medical condition does not state a valid claim of medical
 16 mistreatment under the eighth amendment.” *Estelle*, 429 U.S. at 106. Medical malpractice
 17 is not a constitutional violation simply because the victim is a prisoner. *Id.*

18 4. Plaintiff’s Medical History

19 Plaintiff’s medical treatment history is extensive. Plaintiff’s records attached to his
 20 complaint establish he fell off of his bunk in or about November 2012 and began
 21 experiencing lower back pain and urinary incontinence. [FAC at 47, 51.] Plaintiff was
 22 taking Tylenol #3 for pain. [*Id.* at 48.] On January 23, 2013, he received an X-ray and MRI
 23 of his lumbar spine to evaluate him for a neurologic problem. [*Id.*] The MRI revealed
 24 minimal degenerative disk disease but otherwise no abnormalities. [FAC at 47, 59.] He was
 25 discharged back to Calipatria State Prison that same day. [*Id.* at 52.]

26 On April 6, 2013 Plaintiff received a testicular ultrasound. [*Id.* at 62.] Dr. Noonan at
 27 Calipatria performed the ultrasound and discovered the left testis has decreased size and
 28 abnormal appearance. [*Id.*] No blood flow was detected to the left testis and Dr. Noonan

1 reported that Plaintiff had a history of injury to the left testis and the issue was “most likely
2 chronic, Necrosis and atrophy.” [*Id.*]

3 On May 16, 2013 Plaintiff was taken to Pioneer Memorial Hospital for back pain and
4 rib pain and received a total body bone scan. [*Id.* at 46.] The scan revealed no abnormalities
5 except for evidence of a healing fracture involving two mid right anterior ribs. [FAC at 46.]
6 On June 11, 2013, Plaintiff had a neurology follow-up via telemedicine. [FAC at 38.] His
7 chief complaint was coccyx pain and he reported urinary leaking. [*Id.*] On June 20, 2013,
8 Plaintiff filed a health care appeal to see a testicular specialist due to his pain. [FAC at 16-2,
9 84.]

10 Plaintiff made health care appeal complaints about his need for a urology referral,
11 more pain pills, and to see pain specialists in June 2013 and November 2013. [*Id.* at 78.] His
12 November 10, 2013 health care appeal complains that his last visit to the hospital for an
13 MRI and testicle evaluation was canceled (presumably by Dr. Kornbluth) and the doctor
14 (also presumably Dr. Kornbluth) was not giving him proper pain medication because
15 Tylenol did not work and psychological medications were not adequate. He alleged
16 deliberate indifference for not being provided the pain medication he wanted. [*Id.* at 90.]
17 Plaintiff received a response to his appeals on January 16, 2014, which reflected Plaintiff’s
18 extensive medical care throughout 2013 and concluded that Plaintiff was on pain
19 medication, but that Plaintiff’s desire for “no pain” is not a reasonable goal due to side
20 effects. [*Id.* at 16-2, 79.] The Chief Medical Executive explained the “goal should be to
21 achieve a level of pain control that allows you to function in your activities of daily living.”
22 [*Id.*] Plaintiff’s health care appeals largely stem from: him disagreeing with telemedicine
23 appointments, not getting to dictate his choice in pain medication, him wanting to see a
24 specialist regarding his testicular pain. [*Id.* at 16-2, 78-79.] On February 19, 2014,
25 Plaintiff’s health care appeal states Dr. Kornbluth violated his Constitutional rights by
26 taking him off the list to see a back specialist and violated his rights by only prescribing him
27 Tylenol for his pain. [*Id.* at 92.]

28 On April 1, 2014 Plaintiff was evaluated by a urologist and recommended for surgery.

1 [Id. at 16-1, 42.] Subsequently, Plaintiff's primary care physician wrote a referral for
 2 surgery. On April 4, 2014, Plaintiff was evaluated by a neurologist regarding back pain.
 3 Recommendations for nerve connection velocity test, electromyogram and physical therapy
 4 were made, but the specialist also considered malingering or another functional disorder
 5 could cause the symptoms. [Id. at 31.] The primary care physician made referrals and these
 6 services were approved. On April 15, 2014, Plaintiff was evaluated by his primary care
 7 physician to discuss his conditions and plan of care. [Id.]

8 Plaintiff filed health care appeal on May 9, 2014 regarding his dissatisfaction about
 9 a neurology telemedicine appointment, as well as pain in his right testicle. [Id. at 85.]

10 i. *Analysis of Medical Care Claims*

11 a. *Claims Against Registered Nurses Manuel and Silva*

12 On February 23, 2013, while Plaintiff was in the holding cell following the attack by
 13 Officer Nuno, RN Silva said she did not see any injuries. [Id. at 9.] Plaintiff advised RN
 14 Silva that he had severe pain in his lower back and on the right side of his chest, but RN
 15 Silva walked away. [Id. at 14.] Several minutes prior to the nurses' follow-up examination,
 16 Officer Badilla took numerous photographs of Plaintiff's body. [Id.] Plaintiff claims
 17 pictures depict him in a lot of pain. [Id.] When Plaintiff was put back in his cell, he pushed
 18 the call button and RNs Silva and Manuel came. [Id. at 11, 14.] Plaintiff complained about
 19 right-side chest pain. [Id. at 11.] Plaintiff further advised RN Silva and RN Manuel that the
 20 pain in his side increased when he tried to take a deep breath. [Id. at 14.] An EKG was
 21 done with negative results. [Id. at 11.] A doctor was contacted, advised of Plaintiff's pain
 22 and complaints, and prescribed codeine #3 for pain, but only for one day. [Id. at 14.]
 23 Because the nurses' did not diagnose a injury, Plaintiff was refused any further tests, X-rays,
 24 MRI, bone scan, or other treatment. [Id.]

25 The February 23, 2013 medical records indicate Plaintiff complained of pain to his
 26 right side. [Id.] An MRI done before the February 23, 2013 incident with Officer Nuno
 27 showed there was nothing wrong with Plaintiff's ribs. [Id.] After Plaintiff filed a grievance
 28 regarding his pain, a bone scan done on May 16, 2013 showed two broken ribs. [Id. at 11,

1 14.] Plaintiff claims that if he received adequate treatment on February 23, 2013, he would
2 have been diagnosed with broken ribs sooner. [*Id.* at 14.] Plaintiff alleges that due to the
3 nurses' negligent medical observation and deliberate indifference, Plaintiff was forced to
4 endure extreme pain for several months without medication. [*Id.*]

5 Plaintiff objectively establishes the existence of a serious medical need through his
6 expression of the pain he experienced in his right chest, his breathing concerns and later
7 discovery of two fractured ribs. Plaintiff fails, however, to provide enough evidence to
8 establish RN Manuel and RN Silva denied, delayed or intentionally interfered with his
9 medical treatment. Plaintiff does not explain how the nurses' diagnosis, or lack thereof,
10 amounted to more than at most, negligence. Moreover, Plaintiff was treated by a doctor and
11 given an EKG the same day of the attack. Even though Plaintiff alleges RN Silva stated she
12 "saw" no injury and his demeanor evidenced he was in pain, he does not provide any facts
13 to suggest that the nurses' state of mind rose to a level of deliberate indifference. There are,
14 therefore, no facts from which the Court can draw the reasonable inference that Defendants
15 Manuel and Silva perceived a risk to Plaintiff and were deliberately indifferent to that risk.
16 In fact, the Manuel and Silva ensured Plaintiff received an EKG to evaluate his chest pain
17 complaints.

18 Accordingly, Defendant's Motion to Dismiss Plaintiff's claims of deliberate
19 indifference against RNs Manuel and Silva should be granted without prejudice and with
20 leave to amend in order for Plaintiff to allege facts sufficient to cure the deficiencies noted
21 above.

22 **b. Claim Against Dr. Kornbluth**

23 Plaintiff alleges Dr. Kornbluth told him, "we have spent a lot of money on you, so if
24 you have thousands to spend then get your medical issue taken care of upon your release."
25 [*Id.* at 15.] He further alleges that Dr. Kornbluth took him off a specialist visit list, delayed
26 his surgery and refused to give him pain medication. [*Id.* at 3.] Plaintiff had to go one year
27 before he got his testis removal surgery—and only received the surgery after his family
28 helped and he filed another grievance. [*Id.*] He claims the specialist he had requested for

1 months ultimately found he had nerve and muscle damage to his left ankle and leg. [*Id.*]
2 Plaintiff also indicates he filed a 602 grievance for pain medication on February 26, 2014,
3 which was denied by Dr. Kornbluth in violation of his rights. [*Id.* at 16.]

4 Plaintiff's testis removal surgery and discovery of nerve and muscle damage
5 objectively establish the existence of serious medical needs. Plaintiff, therefore, adequately
6 details his severe pain, incontinence, and testicular atrophy. Plaintiff also details how he
7 utilized the prison's inmate appeals process in an attempt to seek pain relief and attention
8 for his various medical issues, including requests and approval for specialists visits and
9 surgery. It is only, however, Plaintiff's recital of Dr. Kornbluth's alleged comments about
10 too much money being spent on Plaintiff and the claim that Dr. Kornbluth intentionally
11 removed Plaintiff from the list permitting him to visit specialists that sufficiently state a
12 claim for deliberate indifference.

13 As such, when the facts are viewed in the light most favorable to Plaintiff, Plaintiff
14 alleges sufficient facts to support the claim that Dr. Kornbluth knowingly disregarded a
15 substantial risk to his health by intentionally denying and delaying his medical treatment.
16 *See Tyler v. Smith*, 458 Fed. Appx. 597, 598 (9th Cir. 2011) (reversing district court's
17 decision to dismiss action alleging deliberate indifference relating to a claim regarding
18 delays in orthopedic treatment because the facts alleged show that as a result of filing
19 grievances and having appointments with defendant, defendant was aware of plaintiff's pain
20 and mobility problems, but delayed in referring plaintiff to a specialist). Accordingly, the
21 Court recommends that the motion to dismiss Plaintiff's claim against Dr. Kornbluth for
22 deliberate indifference be denied.

23 **C. Fourteenth Amendment Due Process Claims**

24 Plaintiff alleges a due process claim against Officer Elmore for not preparing a report
25 documenting his attack of another inmate. [FAC at 5.] He also alleges due process violations
26 against Defendants Nuno, Manuel and Silva for preparing false reports regarding his
27 February 23, 2013 incident with Nuno. [*Id.* at 7-12.] Lastly, Plaintiff asserts a due process
28 claim against Lt. Beltran with respect to Plaintiff's disciplinary hearing relating to the Nuno

1 incident. [*Id.* at 8.]

2 **1. Legal Standard**

3 The Fourteenth Amendment provides that no state shall deprive a person of life,
4 liberty, or property without due process of law. The procedural guarantees of due process
5 apply only when a constitutionally-protected liberty or property interest is at stake. *Bd. of*
6 *Regents v. Roth*, 408 U.S. 564, 569-70 (1972) (the Fourteenth Amendment’s Due Process
7 Clause does not trigger the need for procedural protections in every instance involving the
8 state’s deprivation of an individual’s liberty, but only when there is a cognizable liberty
9 interest at stake). Protectable liberty interests arise from the Fourteenth Amendment’s Due
10 Process Clause itself, or from state laws or regulations deemed to have created a liberty
11 interest cognizable as a civil right. *Meachum v. Fano*, 427 U.S. 215, 224-27 (1976); *Wolff*
12 *v. McDonnell*, 418 U.S. 539, 557-58 (1974) (describing minimum safeguards before a state,
13 for disciplinary reasons, seeks to withdraw sentence credits a prisoner has already acquired);
14 *Smith v. Sumner*, 994 F.2d 1401, 1405-06 (9th Cir. 1993). A plaintiff who fails to allege
15 specific proceedings in which his due process rights were violated does not state a claim.
16 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

17 **2. Application to Claim Against Elmore**

18 Defendant Elmore contends that Plaintiff’s allegations do not state a due process
19 claim against her because even if she did attempt to cover-up a fight between Plaintiff and
20 the SNY inmate, Plaintiff was not denied any process he was due. [Mot. to Dismiss at 17.]
21 Defendant rightfully argues that Plaintiff’s claim against her has no merit. [*Id.*] Indeed,
22 Plaintiff does not allege a proceeding where he would have been due any process because
23 he was never disciplined for the fight. Under no circumstances does the situation Plaintiff
24 alleges suggest, “a dramatic departure from accepted standards for conditions of
25 confinement.” *Overton v. Bazzetta*, 539 U.S. 126, 136-37 (2003). Therefore, the Court
26 finds that Plaintiff fails to allege the type of “atypical and significant hardship” necessary
27 to support a cognizable due process interest protected by the Fourteenth Amendment or
28 created by state law. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1093-94 (9th Cir 1986)

1 (addressing liberty interests under the due process clause when in prison). Accordingly,
 2 Defendant Elmore's motion to dismiss Plaintiff's due process claim should be granted.
 3 Because Plaintiff cannot allege a proceeding where he was denied due process with respect
 4 to the above, Plaintiff should not be allowed leave to amend this claim.

5 **4. Application to Claims Against Officer Nuno, RN Manuel, and RN Silva**

6 At the outset, Defendants argue that Plaintiff's due process claims against Officer
 7 Nuno, RN Manuel, RN Silva and Lt. Beltran are *Heck*-barred. [Mot. to Dis. at 18-20.] As
 8 addressed earlier with respect to *Heck* and the excessive force claim, the relevant question
 9 is whether a finding for Plaintiff on his due process claims would necessarily imply the
 10 invalidity of his disciplinary conviction and the accompanying loss of time credits he
 11 received as a result of his conviction. *Heck*, 512 U.S. at 486-87. Plaintiff's due process
 12 claim alleges Officer Nuno prepared false reports identifying himself as the victim, and that
 13 Officer Nuno's false reports resulted in Plaintiff being found guilty of battering Officer
 14 Nuno and spending over a year in administrative segregation. [FAC at 7, 13.] Plaintiff also
 15 alleges RN Manuel falsely reported she saw Plaintiff hit Officer Nuno, and that on the
 16 February 23, 2013 Medical Report of Injury 7219, RNs Manuel and Silva falsely stated
 17 Plaintiff had no injuries. [*Id.* at 7, 10, 14.]

18 Because an outcome in Plaintiff's favor on the above claims would necessarily negate
 19 the disciplinary decision finding Plaintiff guilty of battering Officer Nuno, this Court
 20 recommends that these claims be dismissed as *Heck*-barred. The Court further recommends
 21 that Plaintiff not be granted leave to amend on the claims because the favorable termination
 22 doctrine would render any amendment on these claims futile.

23 **5. Application to Claim Against Lt. Beltran**

24 Lt. Beltran is the California Department of Corrections and Rehabilitation official
 25 who conducted Plaintiff's Rules Violation Report ("RVR") hearing. [*Id.* at 13.] Plaintiff
 26 contends Lt. Beltran did not let him present a defense or evidence. [*Id.* at 11, 13.] Instead,
 27 Lt. Beltran simply stated that he had to find Plaintiff guilty due to the pending referral to the
 28 District Attorney for prosecution and he would let the court deal with the charge against

1 Plaintiff. [*Id.*] Plaintiff claims Lt. Beltran found him guilty of the offense and told him to
 2 “get out.” [*Id.*] Plaintiff appears to claim a due process violation against Lt. Beltran due to
 3 his failure to properly review Plaintiff’s evidence and to foreclose Plaintiff from presenting
 4 his defense. [*Id.* at 11, 13.]

5 This claim is also barred by the favorable termination doctrine. *Edwards v. Balisok*,
 6 520 U.S. 641, 643–48 (1997). Plaintiff was convicted in prison disciplinary proceedings
 7 of battery on Officer Nuno. As a result of the conviction, he lost good-time credits. His
 8 claim is the same as the claim made in *Edwards*: that he was denied the opportunity to put
 9 on a defense and present exculpatory evidence. *See Edwards*, 520 U.S. at 646. Like in
 10 *Edwards*, Plaintiff’s claim for damages based on allegations the Lt. Beltran was biased and
 11 did not afford him due process would necessarily imply the invalidity of the punishment
 12 imposed in the disciplinary proceedings and is therefore not cognizable under section 1983.
 13 *Id.* at 648. As such, the motion to dismiss should be granted and leave to amend be denied
 14 because amendment would be futile under the circumstances.

15 **D. Supervisory Liability Claims**

16 Plaintiff contends Dr. Ball and Warden Montgomery had responsibility to oversee
 17 the employees and properly train them. [FAC at 8.] He contends the failure to supervise
 18 and train the officers led to the incident with Officer Nuno and his injury. [*Id.*]

19 1. *Legal Standard*

20 Supervisory liability may be imposed in an individual capacity only when the
 21 supervisor participated in or directed the violations, or knew of the subordinate’s violations
 22 and failed to act to prevent them. *Corales v. Bennet*, 567 F.3d 554, 570 (9th Cir. 2009).

23 “Under Section 1983, supervisory officials are not liable for actions of
 24 subordinates on any theory of vicarious liability. A supervisor may be liable
 25 if there exists either (1) his or her personal involvement in the constitutional
 26 deprivation, or (2) a sufficient causal connection between the supervisor’s
 27 wrongful conduct and the constitutional violation.” *Hansen v. Black*, 885 F.2d
 28 642, 645-46 (9th Cir. 1989) (citations omitted).

“[A]lthough there is no pure respondeat superior liability under § 1983, a supervisor
 is liable for the acts of his subordinates ‘if the supervisor participated in or directed the
 violations, or knew of the violation [of subordinates] and failed to act to prevent them.’”

1 *Preschooler II v. Clark County School Bd. of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007),
2 quoting *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). For instance, officials can be
3 held liable for their failure to implement a proper mental health care program or failure to
4 adequately train or supervise subordinates. *Greason v. Kemp*, 891 F.2d 829, 836-37 (11th
5 Cir. 1990). In addition, a supervisor who is informed of an alleged Eighth Amendment
6 violation, e.g. pursuant to review in an inmate's administrative grievance, may be liable if
7 he or she failed to remedy the violation. *Penner*, 439 F.3d at 1097-98.

8 2. *Analysis of Claims Against Dr. Ball and Warden Montgomery*

9 Plaintiff alleges Warden Montgomery and Dr. Ball are responsible for ensuring that
10 employees are properly trained and that the lack of proper training caused his injuries.
11 [FAC 5-6, 8.] Next, Plaintiff alleges that it is the Warden's and Dr. Ball's responsibility to
12 ensure that everyone in their care is safe when receiving medical treatment. [*Id.* at 14.]
13 Plaintiff further contends that the lack of monitoring cameras in the infirmary contributed
14 to his injury suffered after the incident with Nuno in the infirmary. [*Id.* at 8, 14.]

15 Plaintiff, however, fails to state a claim against Warden Montgomery and Dr. Ball
16 under a theory of supervisory liability because he has not alleged facts that would support
17 a claim that these defendants either: personally participated in the alleged deprivation of
18 constitutional rights; knew of the violations and failed to act to prevent them; or
19 promulgated or 'implemented a policy so deficient that the policy itself is a repudiation of
20 constitutional rights and is the moving force of the constitutional violation.' *Hansen v.*
21 *Black*, 885 F.2d 642, 646 (9th Cir. 1989). Furthermore, Plaintiff has failed to provide facts
22 indicating that either Dr. Ball or Warden Montgomery was personally involved in a Eighth
23 Amendment violation against him. Accordingly, Defendants' motion to dismiss Plaintiff's
24 claims alleging Warden Montgomery and Dr. Ball acted with deliberate indifference through
25 their supervisory liability should be granted. Plaintiff should be allowed leave to amend to
26 cure the deficiencies noted above.

27 ///

28 ///

1 **E. First Amendment Retaliation Claims**

2 Plaintiff vaguely, and in conclusory fashion, alleges First Amendment retaliation
3 claims against Silva, Nuno, Manuel, Kornbluth and unnamed and unspecified staff.
4 [FAC at 7.]

5 **1. Legal Standard**

6 Retaliation by a state actor for the exercise of a constitutional right is actionable
7 under 42 U.S.C. § 1983 even if the act, when taken for different reasons, would have
8 been proper. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977).
9 Although retaliation is not expressly referred to in the Constitution, it is actionable
10 because retaliatory actions may chill the exercise of constitutional rights. *Perry v.*
11 *Sinderman*, 408 U.S. 593 (1972). “Within the prison context, a viable claim of First
12 Amendment retaliation entails five basic elements: (1) An assertion that a state actor
13 took some adverse action against, an inmate (2) because of (3) that prisoner’s protected
14 conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment
15 rights, and (5) the action did not reasonably advance a legitimate correctional goal.”
16 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted). To show
17 that the adverse action was taken because of protected conduct, a plaintiff must offer
18 facts linking the alleged retaliation to the exercise of a constitutional right. *See Pratt v.*
19 *Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). A prisoner must also establish that the
20 protected conduct was a substantial or motivating factor for the alleged retaliatory acts.
21 *Mt. Healthy City Bd. of Ed.*, 429 U.S. at 285-86. Retaliatory motive may be inferred,
22 however, from the timing and nature of the alleged retaliatory activities. *Soranno’s*
23 *Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314-16 (9th Cir. 1989).

24 The Ninth Circuit has held that preserving institutional order, discipline and
25 security are legitimate penological goals that, if they provide the motivation for an
26 official act taken, will defeat a claim of retaliation. *Barnett*, 31 F.3d at 816; *Rizzo v.*
27 *Dawson* 778 F.2d 527, 532 (9th Cir. 1985) (“Challenges to restrictions on first
28 amendment rights must be analyzed in terms of the legitimate policies and goals of the

1 correctional institution in the preservation of internal order and discipline, maintenance
 2 of institutional security, and rehabilitation of prisoners.”) The burden is on Plaintiff to
 3 demonstrate that legitimate correctional purposes did not motivate prison officials’
 4 actions. *Pratt*, 65 F.3d at 808.

5 2. *Application to Claim Against RN Silva*

6 After Plaintiff had his left testicle removed around April 2014, RN Silva was
 7 disrespectful and unprofessional when she said in public that Plaintiff’s sex was now
 8 “unknown.” [*Id.* at 15; Exhibit C at 42.] Plaintiff was shocked and embarrassed. [*Id.*]
 9 RN Silva laughed. [*Id.*] She said, “well didn’t you just have it cut off”? [*Id.*] Plaintiff
 10 claims a First Amendment retaliation violation against RN Silva for making disrespectful
 11 comments about Plaintiff’s medical issues. [*Id.* at 12.] Plaintiff does not specify
 12 engagement in any protected conduct that led to retaliation by RN Silva, nor any facts
 13 that his engagement in protected conduct was a substantial or motivating factor in the
 14 allegedly retaliatory conduct. *Pratt*, 65 F.3d at 807; *Mt. Healthy City Bd. of Ed.*, 429
 15 U.S. at 285-86. Plaintiff also fails to state how the exercise of his First Amendment
 16 rights was chilled due to RN Silva’s rude comments. *Rhodes*, 408 F.3d at 567-68.

17 Accordingly, Plaintiff fails to state a retaliation claim and the Court recommends
 18 that the motion to dismiss the retaliation claim against RN Silva be granted. Plaintiff,
 19 however, should be permitted leave to amend to allege facts sufficient to cure the noted
 20 deficiencies in the claim—mainly to allege engagement in protected activity, how
 21 engagement in that activity was a substantial or motivating factor in Silva’s retaliatory
 22 actions, and how Plaintiff was chilled in the exercise of his First Amendment rights by
 23 Silva’s actions.

24 3. *Application to Officer Nuno and RN Manuel*

25 Plaintiff alleges that prior to being attacked by Officer Nuno on February 23,
 26 2013, Plaintiff heard Sgt. Mejia, RN Manuel, and Officer Nuno talking about the
 27 incident that occurred five days earlier where Plaintiff was involved in a fight with an
 28 SNY inmate. [FAC at 9.] Defendants contend Plaintiff fails to state a retaliation claim

1 because fighting is not protected conduct. [Mot. to Dismiss at 22.] This Court agrees.
 2 Plaintiff's inference that Defendants Nuno and Manuel must have retaliated against him
 3 due to his fight with the SNY inmate fails to state a claim because Plaintiff has not
 4 alleged the existence of a core element: engagement in a protected activity. Without
 5 stating facts indicating Plaintiff was engaging in protected conduct, he cannot state a
 6 retaliation cause of action. *Pratt*, 65 F.3d at 807. He also fails to state facts to indicate
 7 that his engagement in protected conduct was a substantial or motivating factor in the
 8 retaliatory conduct. *Mt. Healthy City Bd. of Ed.*, 429 U.S. at 285-86. Finally, Plaintiff
 9 fails to state facts to show how the officers conversation was retaliatory conduct.

10 Accordingly, Defendants' motion to dismiss Plaintiff's First Amendment
 11 retaliation claims against Officer Nuno and RN Manuel should be granted. Plaintiff
 12 should not be allowed leave to amend because fighting is not protected conduct and
 13 cannot give rise to a cognizable retaliation claim.

14 4. *Application to Dr. Kornbluth*

15 Plaintiff also alleges Dr. Kornbluth told him, "we have spent a lot of money on
 16 you, so if you have thousands to spend then get your medical issue taken care upon your
 17 release;" and took him off a specialist visit list, delayed his surgery for testis removal and
 18 refused to give him pain medication. [*Id.* at 3.]

19 Again, Plaintiff has failed to allege that Dr. Kornbluth's actions were made in
 20 response to Plaintiff engaging in a protected activity. Moreover, the facts Plaintiff
 21 presents with respect to Dr. Kornbluth's comments are more appropriately considered
 22 under the deliberate indifference to medical needs rubric, which Plaintiff alleged and the
 23 Court reviewed above. Accordingly, Defendants Motion to Dismiss Plaintiff's First
 24 Amendment retaliation claim against Dr. Kornbluth should be granted without leave to
 25 amend because these allegations will proceed under the deliberate indifference to
 26 medical needs claim.

27 5. *Claims against unnamed correctional and medical staff*

28 Plaintiff allegedly experienced many problems with correctional staff and medical

1 staff and alleges First Amendment retaliation claims for his use of the grievance system.
 2 [*Id.* at 6.] Specifically, Plaintiff alleges that on March 1, 2013, he was discharged from
 3 the infirmary and sent to administrative segregation without his lock-up order. [*Id.* at
 4 11.] An unnamed supervisor took Plaintiff out of the infirmary even though his medical
 5 issues had not changed, then tried to bring him back after noticing it was wrong to have
 6 Plaintiff around other inmates while he wore diapers. [*Id.* at 6.] He also claims that at
 7 times medical staff would joke about his urinary incontinence, making others laugh, and
 8 gave Plaintiff pads instead of diapers. [*Id.*] Plaintiff also generally alleges a First
 9 Amendment retaliation claim against custody staff. [FAC at 11-12.] He alleges custody
 10 staff lost his property in retaliation for him filing grievances. [*Id.*]

11 Plaintiff's claims fail because he has not accused a particular person of
 12 mishandling his property, or how his grievance filings were the substantial and
 13 motivating factor for the unnamed infirmary worker's decision to release him while
 14 needing diapers. Most significant, Plaintiff fails to state how these broad statements of
 15 retaliation chilled him from exercising his First Amendment rights.

16 Thus, these general retaliation claims should be dismissed for: 1) failing to name
 17 specific defendants, 2) failing to identify specific retaliatory actions by the unnamed
 18 defendants, 3) failure to state facts indicating the retaliatory actions were substantially
 19 motivated by Plaintiff's engagement in protected activity, and 4) failing to state how he
 20 was chilled from exercising his First Amendment rights. Leave to amend should be
 21 allowed in order for Plaintiff to cure these deficiencies.

22 **F. Injunctive Relief**

23 Plaintiff included a claim for injunctive relief from the conditions of confinement
 24 in the infirmary at Calpatría State Prison. The claim is moot not only because prior to
 25 filing this complaint Plaintiff was transferred to R.J. Donovan State Prison, but also
 26 because Plaintiff is no longer incarcerated. *Dilley v. Gunn*, 64 F.3d 1365, 1368–69 (9th
 27 Cir.1995) (“An inmate’s release from prison while his claims are pending will generally
 28 moot any claims for injunctive relief relating to the prison’s policies unless the suit has

1 been certified as a class action.”); *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir.1991)
 2 (per curiam); *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986). Thus, the claim
 3 for injunctive relief should be dismissed as moot.

4 **G. Official Capacity Claims**

5 Plaintiff also made claims for damages against all named defendants in both their
 6 individual and official capacities. State officials sued for damages within their “official
 7 capacities” are not “persons” within the meaning of section 1983. *Doe v. Lawrence*
 8 *Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir.1997). Suits against state officials in
 9 their official capacities are “no different than suits against the state itself, and the
 10 Eleventh Amendment bars such suits.” *Shilling v. Crawford*, 377 Fed. Appx. 702, 705
 11 (9th Cir. 2010). Plaintiff has made no allegation that Defendants acted pursuant to a
 12 policy or custom of constitutional deprivation. *See Redman v. County of San Diego*, 942
 13 F.2d 1435, 1443-44 (9th Cir. 1991). Accordingly all claims against Defendants in their
 14 official capacities should be dismissed without leave to amend because amendment
 15 would be futile.

16 **V. CONCLUSION**

17 Having reviewed the matter, the undersigned Magistrate Judge recommends that
 18 Defendant’s Motion to Dismiss be **GRANTED** as to all claims except Plaintiff’s Eighth
 19 Amendment excessive force claim against Officer Nuno, and Eighth Amendment
 20 deliberate indifference claim against Dr. Kornbluth. Furthermore, the Court
 21 recommends Plaintiff be given leave to amend where noted to allow Plaintiff an
 22 opportunity to cure the deficiencies identified in the complaint for claims where
 23 amendment would not be futile.

24 **IT IS HEREBY ORDERED** that no later than **September 4, 2015**, any party to
 25 this action may file written objections with the Court and serve a copy on all parties.
 26 This document should be captioned “Objections to Report and Recommendation.”

27 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
 28 the Court and served on all parties no later than **September 14, 2015**.

1 Defendant must also serve this REPORT and RECOMMENDATION on Plaintiff
2 at his last known address and file the Proof of Service with the Court.

3
4 Dated: August 17, 2015


5 BERNARD G. SKOMAL
6 U.S. MAGISTRATE JUDGE
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